

ARAB-MALAYSIAN FINANCE BHD.

v.

LEONG SAN VOON & ANOR.

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J
[ORIGINATING SUMMONS NO. 102
OF 1992]
5 APRIL 1993

LAND LAW: Private caveat - Indefeasibility and priority of charge over caveat - First in time - Equitable interest of a contractual nature - Allegation of fraud.

The registered co-proprietors of a subplot (said land) entered into a development agreement with a developer to develop the said land into a residential housing estate. The registered co-proprietors entered into a supplementary agreement with the developer whereby it was agreed *inter alia* that the developer shall be allotted certain sublots and shall be entitled to sell the said sublots. On 16 August 1991 a memorandum of charge over the land was created by the co-proprietors in favour of the plaintiff in consideration of the plaintiff granting the developer a bridging loan amounting to RM800,000. The memorandum of charge was registered with the land registry.

On or about 18 September 1991 the developer entered into a sale and purchase agreement with the defendants in relation to the said sublots and a terrace house to be constructed thereon. On 23 September 1991 the defendants lodged a caveat over the land which was registered with the land registry. Subsequently, the co-proprietors as chargors and the developer as borrower defaulted in payment of the loan. The defendants refused to withdraw the caveat.

Held:

[1] The charge executed by the registered co-proprietors in favour of the plaintiff was not only first in time but it was duly registered with the Land Registry. This was done before the defendants lodged their caveat. The alleged sale and purchase between the developer and the defendants were made subsequent to the creation and execution of the charge in question.

[2] As regards the sale and purchase agreement executed between the developer and the

a defendants, the latter would merely have an equitable interest of a contractual nature in the sublots as against the developer and or the registered co-proprietors but certainly not as against the plaintiff who was never a party or privy to the said agreement. The plaintiff being a registered chargee of the land in question and being in the position of a registered proprietor of an interest therein, would have attained an indefeasible title against the world under s. 132 of the Sarawak Land Code in the absence of fraud.

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c [3] On the evidence as disclosed in the affidavits, there is no fraud or collusion on the part of the plaintiff. And even if there was fraud or collusion on the part of the registered co-proprietors and or the developer, there is not a scintilla of evidence that the plaintiff was a party to such fraud or collusion.

d [Plaintiff's application allowed with costs.]

Cases referred to:

Hajah Rajiah bte. Man v. Tai Cheng Finance Bhd. [1987] 2 CLJ 154 (fol)
Malayan United Finance Bhd. v. Tay Lay Soon [1991] 2 CLJ 899/[1991] SCR 105 (cit)
e *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 (fol)
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 (dist)
Supreme Finance (M) Bhd. v. Chandan Daya Sdn. Bhd. & Peggy Mavis Moreira (Intervenor) [1991] 1 CLJ 386 (fol)
f *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] MLJ 225 (fol)
Saminathan v. Pappa [1981] 1 MLJ 121 (cit)
PJTV Denson (M) Sdn. Bhd. & Ors. v. Roxy (M) Sdn. Bhd. [1980] 2 MLJ 136 (cit)
Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 CLJ 183/[1983] 1 MLJ 81 (fol)

g **Legislation referred to:**

Sarawak Land Code (Cap. 81) ss. 112(2), 113, 115, 132, 177(1)
National Land Code 1965, s. 327

For the plaintiff - S.C. Ting; M/s. Yong & Wong
For the defendants - Hii Kwong King; M/s. Hii & Hii

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JUDGMENT

Steve L.K. Shim J:

The plaintiff has pursuant to s. 177(1) of the Sarawak Land Code (Cap. 81) applied for an order to remove the caveat lodged by the defendants. The said caveat was registered at the Sibu Land Registry on 27 September 1991 as Sibu Instrument No. L8682/1991. It

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related to subplot 130 containing 174.2 square meters, more or less together with the buildings thereon and appurtenances thereof comprised in Sibul Lease of Crown Land No. 40325 situate at Sungei Seduan, Sibul, covering an area of 2.0882 hectares. The application is supported by the affidavit of Lutfah bte. Ismail, a legal officer of the plaintiff affirmed on 13 November 1992. The defendants are resisting the application, filing in support, the affidavit in opposition affirmed by Leong San Voon on 3 February 1993.

The undisputed facts as disclosed in the affidavits can be briefly stated herein. On or about 17 June 1988, the registered co-proprietors of the land aforesaid entered into a development agreement with Grandhill Construction Development Sdn. Bhd. (the developer) wherein they appointed the developer *inter alia* to develop the land into a residential housing estate. On or about 18 September 1990, the registered co-proprietors entered into a second or supplementary agreement with the developer whereby it was agreed *inter alia* that the developer shall be allotted certain sublots including subplot 130. It was further agreed therein that the developer shall be entitled to enter into any arrangements for the sale of the sublots. On 16 August 1991, a memorandum of charge over the land was created by the co-proprietors in favour of the plaintiff in consideration of the plaintiff granting the developer a bridging loan amounting to RM800,000. A memorandum of charge was registered with the Sibul Land Registry as Sibul Instrument No. L.7212/1991. On or about 18 September 1991, the developer entered into a sale and purchase agreement with the defendants in relation to subplot 130 and a terrace house to be constructed thereon. And on 23 September 1991 the defendants lodged a caveat over the land in question and this was registered with Sibul Land Registry as Sibul Instrument No. L.8682/1991 on 27 September 1991. Subsequently, by a letter dated 4 September 1992, the plaintiff wrote to the defendants requesting them to withdraw the caveat but this was not acceded to. Hence, the application dated 24 November 1992 by the plaintiff to remove the said caveat. In the meanwhile, the plaintiff had also commenced action in the High Court for the auction sale of the land when the registered co-proprietors as chargers and the developer as borrower defaulted in payment of the loan.

- a** At the outset, I should mention that s. 177(1) under which this application is made simply states that any registered proprietor or any other person having a registered estate or interest in the estate or interest against which the caveat has been lodged, may at any time, apply to the High Court for an order that the caveat be removed. It is not in dispute that the plaintiff in the instant case is a registered chargee of the land in question and thus in the position of a registered proprietor of an interest therein: see ss. 113 and 115. As such, it would have a registered title to rely on as *prima facie* evidence of its right to the land: see *Hajah Rajiah bte. Man v. Tai Cheng Finance Bhd.* [1987] 2 CLJ 154.
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It seems clear that the main thrust of the plaintiff's case is directed essentially, if not solely, to the issue of the indefeasibility and priority of the plaintiff's charge over the caveat lodged by the defendants. In this connection, Mr. S.C. Ting for the plaintiff has relied on s. 132 of the Code which stipulated:

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- (1) Subject to the provisions of this Code, the registered proprietor of any estate or interest in land to which this section applied shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except -
- f**
- (a) the estate or interest of a proprietor included in the Register in priority to the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;
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- (b) as regards any portion of land included in the issue document of title by virtue of a wrong description:
- Provided that this exception shall not apply if the registered proprietor is a purchaser in good faith and for value of the portion of land affected, or derives title through such a purchaser;
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- (c) the implied conditions, obligations and restrictions referred to in s. 32;
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- (d) the interest of a tenant in possession of land for a term not exceeding one year;
- (e) any change affecting the land under any written law; and
- (f) any easement lawfully created and subsisting on the 1st day of January

1958 or at such later date when the estate or interest affected by such easement becomes included in the Register.

- (2) This section shall apply to any estate or interest in land included in the Register, other than an estate or interest included in a previous register under the former Land Ordinance and included in the Register by reason only of subsection (2) of s. 112.

He has also invoked the Supreme Court case of *Malayan United Finance Bhd. v. Tay Lay Soon* [1991] SCR 105 where the brief facts in the headnote state as follows: registered proprietor of 2 parcels of land, in consideration of a loan advanced to it by MUI Finance (appellant), executed a charge of the said land in favour of the appellant. Five years later, the registered proprietor entered into some negotiations with the respondent purchaser for the sale of the land which had already been charged to the appellant. Though no final contract was concluded between the parties, the respondent alleging that there was a binding agreement for the sale and purchase of the said land, entered two private caveats against the land. The respondent subsequently instituted an action against the registered proprietor for specific performance of the contract and for damages. Meanwhile, in default of repayment of the loan by the registered proprietor, the appellant instituted the necessary foreclosure proceedings to enforce the charge. The appellant then gave notice to the respondent to remove the caveats and thereupon applied to the High Court for their removal. The respondent in resisting the application, asserted that he had a caveatable interest in the land by virtue of the sale and purchase agreement between him and the registered proprietor. The High Court dismissed the application on the ground that the respondent as caveator had satisfied the Court that both in fact and in law there were serious issues to be tried in relation to the contract of sale of the charged land and that on balance of convenience it would be better to maintain the *status quo* until the trial of the action, instituted by the respondent for specific performance. The appellant, being dissatisfied with the High Court decision, appealed to the Supreme Court. The main issue propagated before the Supreme Court related to the question of priority and indefeasibility of the charge.

- a In the course of his submission before me, Mr. S.C. Ting has drawn particular attention to the following passage wherein Mohd. Jemuri, SCJ (as he then was) stated *inter alia*:

- b What appears to have preoccupied or troubled the mind of the learned Judge which made him feel constrained to make that remark as well as those in the last two paragraphs of his judgment and dismiss the appellants' application is the decisions in *Eng Mee Yong and Macon Engineers* which decided that in an application for the removal of a caveat, the caveator must satisfy the Court both in fact and in law that his claim is not frivolous or vexatious and that on the balance of convenience it would be better to maintain the *status quo* until the disposal of the action. With all respect, to apply such considerations in the context of the appellants' case obscures the real and crucial issue before the High Court. The cursory disposal of the issue by merely citing the authority of *Eng Ah Mooi* does not in our view resolve the issue but rather postpone it. It may be necessary to recapitulate that as between the appellant and the respondent both in the High Court and before us the pivotal issue is the indefeasibility and priority of the charge over the caveats on the part of the appellant and the right of the respondent, in the respondent's own words, to redeem the charge on the part of the respondent.

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f In the event, the Supreme Court, in allowing the appeal, ordered the caveats be removed because the charge registered in favour of the appellant, the chargee, was indefeasible and ranked in priority over the caveats lodged by the respondent, the subsequent purchaser. It should be noted that the respondent caveator had maintained that he had caveatable interest in the property by virtue of the sale agreement but the Supreme Court took the stand that the pivotal issue as between the appellant and the respondent was the indefeasibility and priority of the charge over the caveats. In the course of consideration, the Supreme Court approved the dictum of Gill, CJ in *Macon Engineers Sdn.Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53:

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i Coming now to the second question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent, the basic rule at law, as in equity, is that estates and interest

primarily rank in the order of creation. *Qui prior est tempore potior est jure*: he who is earlier in time is stronger in law. Where there is a system of registration of title to land the one who succeeds in the scramble to get on the register emerges victorious.

In the instant case, the charge executed by the registered co-proprietors in favour of the plaintiff was not only the first in time but it was duly registered with the Sibu Land Registry. This was done before the defendants lodged their caveat. The alleged Sale and Purchase Agreement between the developer and the defendants was made subsequent to the creation or execution of the charge in question. In the premises, the dictum of Gill CJ. in *Macon Engineers* would clearly apply in favour of the plaintiff in this case.

In resisting the application, the defendants have filed an affidavit in opposition which, in essence, contains two propositions:

- (1) that they have a beneficial or caveatable interest in the land, that is subplot 130 by reason of the sale and purchase agreement between them and the developer made pursuant to the development agreement and the supplementary agreement executed between the registered co-proprietors and the developer; that it was on this basis they had lodged the caveat to protect their equitable right;
- (2) that there was collusion between the plaintiff and the registered co-proprietors in moving this application to remove the said caveat.

In developing the first proposition, Mr. Hii, for the defendants, has relied on the Privy Council case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212. Therein, Lord Diplock had, in an application for removal of caveat under the National Land Code, said *inter alia*:

... he (caveator) must first satisfy the Court that on the evidence presented to it, his claim to an interest in the property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

a In the light of the above principle, Mr. Hii contends that by virtue of the sale and purchase agreement entered into between the defendants and the developer acting as agent of the registered co-proprietors, the defendants have a caveatable or beneficial interest in the land. According to him the defendants had purchased subplot 130 which included a terrace house from the developer. They had already paid in total a sum of RM40,500. Furthermore, they had instituted action against the registered co-proprietors and the developer *inter alia* for specific performance of the said agreement. He therefore contends that in the circumstances the defendants had raised some serious questions to be tried and that on balance of convenience, it would be better to maintain the *status quo* until the trial of the action.

d It must be noted that in *Eng Mee Yong*, the appellants who applied for the removal of the caveat lodged by the respondent, were in fact the registered proprietors or landowners of the land. They had agreed to sell the land to the respondent but they subsequently terminated the sale agreement. In our case, the application for removal of the caveat came from the plaintiff who was the chargee of the land. There is nothing to indicate or suggest that the plaintiff chargee was a party or privy to the sale and purchase agreement entered into between the developer and the defendants, assuming, for the moment, that the developer could be regarded as an agent of the registered co-proprietors at all material times. In this connection, it is, I think, pertinent to refer to the observation of Lim Beng Choon J. in *Supreme Finance (M) Bhd. v. Chandan Daya Sdn. Bhd. & Peggy Mavis Moreira (Intervenor)* [1991] 1 CLJ 386 when he said *inter alia*:

In addition I must also bear in mind the legal principle governing the rights of a purchaser of land pending the registration of the transfer of the land to him under the National Land Code. In *Bachan Singh v. Mahinder Kaur & Ors.* [1956] MLJ Thomson J. observed at pp. 97-98:

To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights.

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Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *as rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code.

This observation of Thomson J. was cited with approval by our Federal Court in *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] MLJ 225 @ 229.

In *Ong Chat Pang*, Gill, FJ. stated that the plaintiff as a purchaser did not obtain an equitable title to the land by virtue of the sale agreement but he would have obtained an equitable interest of a contractual nature in the land which he could protect by a restrictive entry in the Land Register; that in short, he had acquired a caveatable interest in the land. In line with that observation, Lim Beng Choon J. in *Supreme Finance* held that the intervenor who was the purchaser of the land, had merely acquired an equitable interest of a contractual nature in the land as against the defendant chargor but that such interest was no good against the plaintiff chargee, the finance company. He took the view that the sale and purchase agreement executed between the intervenor purchaser and the defendant chargor did not and could not create an encumbrance in the land since the right of the intervenor was an equitable interest of a contractual nature in the land which only afforded him a caveatable interest. He concluded that the plaintiff being a registered chargee, had attained an indefeasible title against the world.

I would adopt the same approach in the present case where as regards the sale and purchase agreement executed between the developer and the defendants, the latter would merely have an equitable interest of a contractual nature in subplot 130 as against the developer and or the registered co-proprietors but certainly not as against the plaintiff who was never a party or privy to the said agreement. The plaintiff being a registered chargee of the land in question and being in the position of a registered proprietor of an interest therein, would have attained an indefeasible title

a against the world under s. 132 of the Sarawak Land Code in the absence of fraud.

This brings me to the second proposition advanced by the defendants, that there was some kind of collusion bordering on fraud between the plaintiff and the registered co-proprietors in moving this application to remove the caveat lodged by the defendants. Now, it is trite law that in pleading fraud, the onus is upon the person alleging fraud to prove it not on the balance of probabilities but beyond reasonable doubt: see *Saminathan v. Pappa* [1981] 1 MLJ 121. As to what constitutes fraud, I need merely cite a passage in the judgment of Raja Azlan Shah, CJ. in *PJTV Denson (M) Sdn. Bhd. & Ors. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136 when he said *inter alia*:

d Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud', that is, dishonesty of some sort for which the registered proprietor is a party or privy. Fraud is the same in all Courts, but such expressions as 'constructive fraud' are ... inaccurate; but 'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled ... Thus in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent ...'

f This passage was cited with approval by Abdul Hamid FJ. (as he then was) in *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81. The facts therein are quite significant in relation to our case and should therefore be worth setting out in some detail. g There, the registered proprietress of a piece of land in Ipoh executed two separate charges over the land in favour of the appellant, a finance company. Both charges were registered. Payment of the loans was demanded by the appellant and on failure to comply, the appellant as chargee applied for an order for the sale of the land. The registered proprietress as chargor was also a developer and she had entered into an agreement with each of the 2nd to 7th respondents to build houses for them on the land. The agreements were made some years before the charge was executed in favour of the appellant. When h i

the respondents subsequently became aware of the said charge, they lodged caveats over the land. The respondents, not naturally, opposed the appellant's application for sale. The learned trial Judge dismissed the application holding that the appellant had not carried out sufficient investigations into the nature of the land; that if it did, it would have discovered that the buildings on the land had been sold to the respondents; that appellant had constructive notice of the respondents' interest in the land as at the time the charge was executed, the chargor was bound by contract to sell the land to the respondents. The learned Judge held the appellant's demand for sale of the land in the face of such notice was unconscionable and constituted a fraud on the respondents. The appellant appealed against the dismissal. In the course of consideration, the Federal Court held *inter alia*:

- (1) that the essential question which must be determined was whether the appellant was a party or privy to any fraud the chargor was guilty of, this being a question of fact; the onus was upon the respondents to prove fraud beyond a reasonable doubt;
- (2) that to constitute fraud, the Court must be satisfied that the circumstances in which the appellant obtained registration of the charge were such that they constituted fraud. The onus was on the respondents to establish that there was actual fraud as opposed to constructive or equitable fraud on the part of the chargor to which the appellant was a party or privy and that it was committed prior to or at the time of registration of the charge. The emphasis of the Court is clear, namely, that to render the interest of the registered owner of the charge defeasible, the fraud must be brought home to him. In the event, the Court held that there was no evidence to establish fraud. In allowing the appeal, the Court ordered the caveats to be removed accordingly.

In the light of the facts, findings and observations in *Tai Lee Finance*, what is the position in our case? Here, there is no specific allegation of fraud by the defendants against the plaintiff but the affidavit in opposition filed by the defendants seems to suggest some form

a of collusion bordering on fraud. For example para 36 states:

Rather, the plaintiff is colluding with the Landowners in commencing the present action to remove our caveat so as to defeat our right title interest and claim to the said house and prejudice our action against the Landowners and the developer. Now produce and shown to me marked "F" is a copy of the letter dated 23 December 1992 which evinced the intention of the Landowners which is totally inconsistent with the claim of the plaintiff herein.

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- c** The document marked 'F' is a letter from the registered co-proprietors and is addressed to the defendants. It is not addressed nor is it copied to the plaintiff. The letter merely contains details of a proposal to salvage the housing project apparently abandoned by the developer and there is a request to the defendants to attend a meeting to discuss the said proposal. There is nothing therein to indicate or suggest how the plaintiff could have colluded with the registered co-proprietors in commencing this application to remove the caveat. Mr. Hii, in his submission, has not really expanded on the issue except to question the *bona fide* conduct of the plaintiff as chargee by alleging that the plaintiff had armed the purchasers including the defendants with ways and means of creating an interest, citing in support, clause 13(c) of the Memorandum of Charge which stipulates:

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The chargor(s) and/or the borrower hereby covenants that during the continuance of this security the chargor(s) and/or the borrower will not without the consent of the chargee in writing first had and obtained:

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- (a)
- (b)
- (c) enter into any transaction with any person, firm or company, except in the ordinary course of business on ordinary commercial terms and on the basis of arm's length arrangements, or establish any exclusive purchasing or sales agency, or enter into any transaction whereby the chargor(s)/Borrower might pay more than the ordinary commercial price for any purchase or might receive less than the full ex-works commercial price (subject to normal trade discounts) for its products.

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I accept that it is implicit in the provisions above that the registered co-proprietors and or the developer could enter into any transaction with a person, firm or company in the ordinary course of business on an arm's length basis, provided a written consent had been obtained from the chargee who is the plaintiff in this case. But to contend, as Mr. Hii seems to have done, that by reason of the provisions in clause 13(c) aforesaid, the plaintiff had allowed the developer to enter into the sale and purchase agreement with the defendants thereby arming the latter with ways and means of creating an interest which turned out to be in conflict with that of the plaintiff chargee, is, in my view, quite misconceived. First, the sale and purchase agreement in question was entered into between the developer and the defendants. The plaintiff was never a party or privy to that agreement. Secondly, at the time the sale and purchase agreement was executed, the defendants must have known or ought to have known of the existence of the registered charge created in favour of the plaintiff. Besides, the provisions of clause 13(c) had the effect of prohibiting the registered co-proprietors as chargors and/or the developer as borrower from entering into any transaction with any person, firm or company in the ordinary course of business, etc., unless a written consent had been obtained from the plaintiff chargee. It is not disputed that no such consent had been obtained in this case. In the circumstances, the question of the plaintiff allowing the developer to enter into the sale and purchase agreement would not arise nor could the defendants be heard to complain that they entered into the said agreement as a result of the conduct of the plaintiff. No fault could be visited upon the plaintiff. If anything, the defendants must bear the blame themselves since they must have known or ought to have known of the existence of the registered charge at the time of the sale and purchase agreement in question. In the premises, I do not think Mr. Hii's contention has any merit whatsoever and I reject it accordingly. On the evidence as disclosed in the affidavits, I can find no fraud or collusion on the part of the plaintiff. And even if there was fraud or collusion on the part of the registered co-proprietors and/or the developer, there is not a scintilla of evidence that the plaintiff was a

a party to such fraud or collusion: see *Hajah Rajiah bte. Haji Man v. Tai Chang Finance Bhd. supra*.

For the reasons given, I hold that as between the plaintiff and the defendants, there are no serious questions to be tried. No balance of convenience in favour of the defendants has been shown. The defendants' remedy, if any, must lie against the developer and/or the registered co-proprietors of the land. Undoubtedly, the plaintiff is the first and only registered chargee of the land namely subplot 130. As such it has an indefeasible title to the land. c The registered charge of the plaintiff is also ranked in priority over the caveat lodged by the defendants. In the premises, the plaintiff is entitled to have the said caveat removed and I so order. Costs of this proceeding be given to the plaintiff.

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